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**UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF CALIFORNIA
SAN FRANCISCO DIVISION**

In re:

PG&E CORPORATION

- and -

**PACIFIC GAS AND ELECTRIC
COMPANY,**

Debtors.

- Affects PG&E Corporation
- Affects Pacific Gas and Electric Company
- Affects both Debtors

** All papers shall be filed in the Lead Case,
No. 19-30088 (DM).*

Case No. 19-30088 (DM)

Chapter 11

(Lead Case)

(Jointly Administered)

**CONSOLIDATED REPLY BRIEF OF THE
OFFICIAL COMMITTEE OF UNSECURED
CREDITORS AND OTHER CREDITOR
GROUPS AND REPRESENTATIVES
REGARDING THE APPROPRIATE
POSTPETITION INTEREST RATE
PAYABLE ON UNSECURED CLAIMS IN A
SOLVENT DEBTOR CASE**

Date: December 11, 2019
Time: 10:00 a.m. (Pacific Time)
Place: United States Bankruptcy Court
Courtroom 17, 16th Floor
450 Golden Gate Avenue
San Francisco, CA 94102

The Creditor Groups¹ hereby respectfully reply² to the *Debtors' Brief Regarding Applicable Rate of Postpetition Interest on Allowed Unsecured Claims and Joinder of PG&E Shareholders* [Docket No. 4624] (the "Debtors' Opening Brief") as follows:

REPLY

1. The Debtors' Opening Brief relies entirely on the assertion that the Ninth Circuit's ruling in Onink v. Cardelucci (In re Cardelucci), 285 F.3d 1231 (9th Cir.), cert. denied, 537 U.S. 1072 (2002) ("Cardelucci"), is an all-encompassing, controlling precedent governing **any** dispute regarding the rate of interest payable on unsecured claims in a solvent-debtor case. It is not, and it cannot be applied, as the Debtors suggest, without regard for the underlying facts or the direct applicability of other Bankruptcy Code provisions that were neither at issue in, nor mentioned (let alone considered) by, the Ninth Circuit in Cardelucci.

2. The Debtors make no attempt to explain the remarkable proposition that the Ninth Circuit’s narrow interpretation of section 726(a)(5) can be expanded to negate other provisions of the Bankruptcy Code, such as sections 103(b), 1124, and 1129(b), and the well-developed caselaw thereunder. Instead, the Debtors simply repeat, half a dozen times, that Cardelucci is “controlling” and “dispositive.” This is a gross overstatement of the scope and the

¹ Capitalized terms not otherwise defined herein have the meanings ascribed to them in the *Consolidated Opening Brief of the Official Committee of Unsecured Creditors and other Creditor Groups and Representatives Regarding the Appropriate Postpetition Interest Rate Payable on Unsecured Claims in a Solvent Debtor Case* [Docket No. 4634] (the “Creditors’ Opening Brief”).

2 The Creditor Groups submit this *Consolidated Reply Brief* jointly pursuant to the Court’s *Order Establishing Pre-Confirmation Briefing and Hearing Schedule for Certain Legal Issues* [Docket No. 4540] (the “Scheduling Order”), and incorporate herein the reservations of rights made in their Opening Brief. The Creditor Groups and the Debtors agreed to the briefing schedule set forth in the Scheduling Order and to forego formal adversary proceedings in order to facilitate an early resolution of certain legal issues that may otherwise delay confirmation. The Creditor Groups however did not uniformly agree to joint briefing of the postpetition interest issue or to the relinquishment of individual appellate rights. Although the Scheduling Order recognizes certain appellate rights of “any aggrieved party,” the Creditor Groups in an abundance of caution wish to expressly reserve the entirety of each constituent Creditor Group’s individual appellate rights.

1 import of Cardelucci that ignores the facts at issue and the statutory context of the dispute in that
2 case, and the express language that the Ninth Circuit employed in its decision.

3 3. The Debtors' sweeping assertion that Cardelucci "squarely" addresses the
4 "very same" issues that confront this Court (Debtors' Br. at 6:14) is demonstrably incorrect, as is
5 their contention that the Creditor Groups' arguments are "a disguised effort to overrule" Cardelucci
6 (Debtors' Br. at 13:9-10). To the contrary, as explained in the Creditors' Opening Brief, the issues
7 on which the Ninth Circuit ruled in Cardelucci are clearly distinct from those presented here. See
8 Debtors' Opening Brief at ¶¶ 6-7, 30-32. The Creditor Groups merely ask the Court to recognize
9 the limited ambit of the holding in Cardelucci – where the court interpreted the phrase "legal rate"
10 in section 726(a)(5) and did not pronounce a sweeping new rule governing every circumstance in
11 every bankruptcy case – by harmonizing it with other binding Ninth Circuit precedent.

14 4. The Debtors are also incorrect when they assert that there are but "two
15 limited exceptions" to section 502(b)(2)'s disallowance of claims for unmatured interest³: section
16 506(b) and section 726(a)(5) (Debtors' Br. at 9:1-8). This is an entirely false construct. The first
17 of these exceptions applies solely to oversecured claims,⁴ while the second applies directly only in
18 cases under chapter 7.⁵ As the case law cited in the Creditors' Opening Brief makes abundantly
19

21 3 Section 502(b)(2) is not applicable here. "While section 502(b)(2) provides that an allowed claim does
22 not include interest unmatured as of the petition date, it does not prohibit the award of interest to
23 creditors in all circumstances." See, e.g., In re Coram Healthcare Corp., 315 B.R. 321, 343 (Bankr. D.
24 Del. 2004). This is made clear, particularly with respect to unimpaired claims, as a result of Congress's
25 repeal of section 1124(3) of the Bankruptcy Code. In repealing section 1124(3), Congress explained
26 that "[a]s a result of this change, if a plan proposed to pay a class of claims in cash in the full amount
27 of the claims," without post-petition interest, "the class would be impaired, entitling creditors to vote
28 for or against the plan of reorganization." Committee Report, 1994 U.S.C.C.A.N. at 3356-56.

4 4 See 11 U.S.C. § 506(b) (providing for postpetition interest "[t]o the extent that an allowed secured
claim is secured by property the value of which . . . is greater than the amount of such claim . . .").

5 5 See In re Dow Corning Corp., 244 B.R. 678, 686 (Bankr. E.D. Mich. 1999) ("§ 726(a)(5) . . . applies
exclusively to chapter 7 proceedings") (emphasis added); see also 11 U.S.C. § 103(b) ("Subsection I
and II of chapter 7 of this title apply **only** in a case under such chapter" (emphasis added)). In chapter
11 cases, this provision applies only indirectly by reference to a hypothetical chapter 7 liquidation in
section 1129(a)(7)(ii).

1 clear, however, these are not the only contexts in which payment of postpetition interest comes
2 into play. The entitlement to postpetition interest in solvent **chapter 11** cases emanates from other
3 provisions of the Bankruptcy Code. As set forth in the Creditors' Opening Brief, there are three
4 separate (and independent) Bankruptcy Code provisions that require payment of postpetition
5 interest to confirm a plan in a solvent-debtor chapter 11 case: section 1124 for **unimpaired**
6 unsecured claims; section 1129(b) for **impaired** unsecured claims in a class that **rejects** a plan; and
7 section 1129(a)(7) for **impaired** unsecured claims of rejecting creditors (even if they are in an
8 **accepting** class). Creditors' Opening Brief at ¶¶ 13-15, 18-32. The Debtors' Opening Brief fails
9 to distinguish among the statutory bases for the entitlement to postpetition interest in different
10 circumstances, claiming, without analysis, that the Cardelucci decision does not mean what it says
11 but instead provides an exclusive, unlimited "be all, end all."
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14 5. The Debtors themselves acknowledge that Cardelucci and its (limited)
15 progeny do not address either section 1124 or section 1129(b) in any way.⁶ In their brief, the
16 Debtors state that neither Cardelucci nor In re Williams, Love, O'Leary & Powers, P.C., 2013 WL
17 4786322 (D. Or. Sept. 3, 2013) ("WLOP") "relied in any way on provisions of the Bankruptcy
18 Code **other than section 726(a)(5)**." Debtors' Opening Brief at 13:12-13 (emphasis added).
19 While the Debtors' characterization is not entirely accurate,⁷ the holdings in these cases are
20 undoubtedly expressly limited to that single Bankruptcy Code provision. See Cardelucci, 285 F.3d
21 at 1233 ("We conclude that **11 U.S.C. § 726(a)(5)** mandates application of the federal interest
22 rate." (emphasis added)); *Letter Opinion re Debtor's Proposed Third Amended Chapter 11 Plan*
23 at 5, In re Williams, Love, O'Leary & Powers, P.C., Case No. 11-37021 (D. Or. Aug. 31, 2012),
24 Docket No. 421, attached hereto as Exhibit A (the "WLOP Letter-Decision") (explaining that the
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27
28 ⁶ Section 1129(a)(7) is not applicable to the facts of these cases.

⁷ See *infra* ¶ 7.

1 sole issue before the court was “the meaning of ‘the legal rate’ of interest *as used in § 726(a)(5)*.⁸”
2 (emphasis added)).

3 6. Moreover, in reaching its decision in Cardelucci, the Ninth Circuit relied
4 heavily on Beguelin v. Volcano Vision, Inc. (In re Beguelin), 220 B.R. 94 (B.A.P. 9th Cir. 1998)
5 (“Beguelin”), which is *also* expressly limited to section 726(a)(5). See id. at 101 (“We hold that
6 ‘interest at the legal rate’ *under § 726(a)(5)* is measured by the federal judgment rate” (emphasis
7 added)).⁹ That is not surprising as all three cases (Beguelin, Cardelucci, and WLOP) dealt with
8 *impaired* claims and thus the only way that the creditors in those cases could be entitled to
9 postpetition interest – other than by forcing a cramdown under section 1129(b), which the creditor
10 neglected to argue in Cardelucci⁹ – was through the application of section 1129(a)(7) and its
11 “importation” of the “legal rate” prescribed by section 726(a)(5).

12 7. The Debtors assert that section 726(a)(5) prescribes the interest rate in *all*
13 circumstances, simply ignoring the clear statutory scheme and attempting to de-couple sections
14 1129(a)(7) and 726(a)(5) by alleging that neither Cardelucci nor WLOP “made any mention of the
15 best interest test” (Debtors’ Br. at 13:13) – supposedly applying section 726(a)(5) in a chapter 11
16 case directly. That, however, is not the case. As discussed above, the Cardelucci court heavily
17 relied on Beguelin, in fact, going as far as explicitly “adopt[ing]” its “reasoning.” 285 F.3d at
18 1234. And Beguelin court did, in fact, expressly base its “reasoning” on the best interest of
19 creditors test as set forth in section 1325(a)(4) of the Bankruptcy Code, noting that it is “virtually
20

21 8 Similarly, the language the Debtors cite to in Collier (Debtors’ Br. at 9:14-16) is expressly limited to
22 section 726(a)(5). None of the other cases cited by the Debtors is to the contrary: In re Robinson, 567
23 B.R. 644 (Bankr. N.D. Ga. 2017), is a chapter 7 case, while In re Wallace, 2007 WL 321402 (Bankr.
24 E.D. Wash. Jan. 29, 2007), was decided based on the “best interest of creditors” test.

25 9 See Cardelucci, *Appellee’s Opening Brief*, 2001 WL 34091272, at * 17 (“At the confirmation hearing,
26 the [creditor] elected to rely solely on §726(a)(5) as made applicable by § 1129(a)(7)(ii) and, subject to
27 a reservation of rights to appeal the bankruptcy court’s determination on that issue, voted to accept the
28 plan. Accordingly, *the only issue preserved for appeal is the meaning of ‘interest at the legal rate’
as used in §726(a)(5)*. That meaning should not be distorted simply because the [creditor] failed to
consider the potential benefit of forcing a cramdown under § 1129(b).” (emphasis added)).

1 identical” to section 1129(a)(7). Beguelin, 220 B.R. at 99. Furthermore, the WLOP court
2 *expressly* based its decision on section 1129(a)(7). See WLOP Letter-Decision at 3. These cases
3 illustrate the statutory link between section 726(a)(5) and 1129(a)(7) – the best interests test of
4 section 1129(a)(7) assures that dissenting creditors receive no less under a chapter 11 plan than
5 what they would receive under chapter 7, including, in a solvent chapter 7 case, interest “at the
6 legal rate.” However, neither the statute nor applicable case law invokes section 726(a)(5) in
7 evaluating entitlement to postpetition interest under sections 1124 or 1129(b). Unlike section
8 726(a)(5), sections 1124 and 1129(b) do not reference an applicable interest rate. Under such
9 circumstances, Ninth Circuit law requires application of state law interest, either by contract or
10 statute. See, e.g., Shoen v. Shoen (In re Shoen), 1997 WL 1403808 (B.A.P. 9th Cir. 1997), aff’d,
11 175 F.3d 1150, 1165 (9th Cir. 1999).

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13 8. This limited reach of Cardelucci has been recognized by other courts. For
14 instance, in In re Martin, 2003 WL 25273864, *5-6 (Bankr. D. Idaho Feb. 28, 2003), the court
15 flatly rejected an attempt to extend Cardelucci to other confirmation requirements of section 1129,
16 stating that, while “[s]ection 726(a)(5) addresses the allowance of interest to unsecured creditors
17 in . . . solvent chapter 7 cases,” it cannot be used as “controlling” the interpretation of other
18 Bankruptcy Code provisions, including section 1129(b).

19
20 9. Indeed, Cardelucci’s mandate that, to satisfy section 726(a)(5), postpetition
21 interest must be paid at the federal judgment rate does not negate the fact that a chapter 11 plan
22 must satisfy *all* Bankruptcy Code requirements for confirmation, including section 1124 and, in a
23 cramdown, section 1129(b). Thus, the Dow Corning court acknowledged that, although “[s]ection
24 726(a)(5) is pertinent to chapter 11 . . . for purposes of determining compliance with 11 U.S.C.
25 § 1129(a)(7)(A)(ii)’s ‘best interest of creditors’ test, . . . it does not necessarily follow from this
26 that the creditor loses whatever right it may have to contract-rate interest” because such right is
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1 “*independent*” as evidenced by section 1129(b). 270 B.R. at 405-06 (emphasis added). To the
2 contrary, “a proposed plan’s compliance with §§ 1129(a)(7)(A)(ii)/726(a)(5) does not vitiate a
3 creditor’s right to interest at the contract rate. Such a right is preserved until such time as the plan
4 is confirmed pursuant to § 1129(b).” Id. at 406 (internal citations omitted).¹⁰ Therefore, creditors
5 have an *independent* entitlement to having all plans comply with all applicable confirmation
6 requirements – such an entitlement in no way undermines Cardelucci’s holding.
7

8 10. The Debtors’ blanket assertion that Cardelucci’s holding “is not in any way
9 limited to impaired claims, contingent on application of the best interests, or qualified in any other
10 respect” (Debtors’ Br. at 13:18-19) is fundamentally incorrect and nothing short of astonishing.
11 Clearly, every holding is necessarily limited by the exact legal issues before the court. Had it been
12 otherwise, the important distinction between a “holding” and “*dicta*” would disappear. That would
13 be unacceptable under clear Ninth Circuit precedent. See, e.g., Biggs v. Sec’y of the Cal. Dep’t of
14 Corrections & Rehabilitations, 717 F.3d 678, 692 (9th Cir. 2013) (explaining that where issues in
15 a prior case were different from those confronting the court, any language that may appear to apply
16 to the case before the court was mere *dicta* and thus not binding).
17

18 11. The Debtors are asking the Court to make wholly unwarranted inferences
19 about the meaning of Cardelucci in relation to sections 1124 and 1129(b) of the Bankruptcy Code
20 based on the fact that the Cardelucci court never mentioned either of them. This conclusion is
21 starkly illogical, since such omissions denote solely the lack of applicability of those provisions to
22 the precise legal question before the Ninth Circuit. The only issue before the Ninth Circuit in
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26 ¹⁰ See also In re Energy Future Holdings, Inc., 540 B.R. 109, 113-114, 123 (Bankr. D. Del. 2013)
27 acknowledging that “neither section 726(a)(5) nor 1129(a)(7) apply to unimpaired creditors” and
28 stating that neither section “either singularly or in tandem serve to create a universal limitation on the
payment of post-petition interest on unsecured debt” and that section 726(a)(5) “does not create a
general rule establishing the appropriate rate of post-petition interest”).

1 Cardelucci was the rate of interest to be paid *under section 726(a)(5)*.¹¹ Cardelucci did not
2 mention section 1124 or 1129(b) because neither was at issue in that case.

3 12. The Debtors also mistakenly rely on Cardelucci to assert that “[i]n
4 bankruptcy, an allowed claim becomes a federal judgment and therefore entitles the holder of the
5 judgment to an award of interest pursuant to federal statute.” Debtors’ Opening Brief at 6.
6 Treating an allowed claim in bankruptcy as “akin to” a federal judgment conflicts with principles
7 of federal preemption. In the Ninth Circuit, absent federal preemption, *state law* governs the
8 accrual of interest on a claim. See, e.g., Hamilton v. Elite of L.A., Inc. (In re Hamilton, 584 B.R.
9 310, 323 (B.A.P. 9th Cir. 2018); Shoen, 1997 WL 1403808 (“The Ninth Circuit applies applicable
10 state law interest rates absent federal preemption Bankruptcy is no different.”).¹² As
11 discussed above, section 726(a)(5) is only applicable in chapter 11 for the purposes of the “best
12 interests of creditors” test with respect to impaired claims. As a result, section 726(a)(5) cannot
13 possibly provide a ground for federal preemption in the context of *unimpaired* claims.¹³

14 13. The Creditor Groups are not inviting this Court to write on a blank slate
15 when determining the applicable postpetition interest rate under sections 1124 and 1129(b). The
16 Ninth Circuit had many occasions to outline the rights of unimpaired creditors, as well as the rights
17 of creditors generally, to postpetition interest in solvent-debtor chapter 11 cases outside the context
18

21 11 “Appellants Willem and Marsha Onink appeal the district court’s application of the federal interest rate
22 as defined by 28 U.S.C. § 1961(a) to an award of post-petition interest pursuant to 11 U.S.C.
§ 726(a)(5).” 285 F.3d at 1233.

23 12 The AHC, and BOKF, NA, in its capacity as Indenture Trustee for the Utility Senior Notes, take no
24 position with respect to the appropriate rate of interest where a claim is based on a contract that does
25 not expressly provide for a particular rate, or is not based on a contract at all, and reserve all rights on
that issue.

26 13 Notably, even after Cardelucci, the Ninth Circuit affirmed confirmation of a plan that awarded
27 postpetition interest on allowed unsecured claims at rates greater than the federal judgment rate. See
Platinum Capital, Inc. v Sylmar Plaza, L.P. (In re Sylmar Plaza, L.P.), 314 F.3d 1070, 1073 (9th Cir.
2002). By so doing, the Ninth Circuit, at least implicitly, rejected the mistaken notion that an allowed
28 claim in a bankruptcy case is akin to a federal judgment (and, therefore, must receive postpetition
interest at the federal judgment rate).

1 of the best interests test – without ever holding that the federal judgment rate should apply. See,
2 e.g., Epicenter Partners, L.L.C. v. CPF Vaseo Ass'n (In re Epicenter Partners, L.L.C.), 2018 WL
3 1354330, at *7 (B.A.P. 9th Cir. Mar. 15, 2018) (allowing negotiated rate of postpetition interest);
4 Pacifica L 51 LLC v. New Invs., Inc. (In re New Invs., Inc.), 840 F.3d 1137, 1142 (9th Cir. 2016)
5 (stating that “[f]or a debtor to render . . . a creditor ‘unimpaired’ and unable to object to the debtor’s
6 plan, the debtor must cure the default but may not ‘otherwise alter the . . . contractual rights’ of
7 the creditor,” including the contractual right to “post-default interest” (internal citations omitted));
8 Gen. Elec. Capital Corp. v. Future Media Prods., 547 F.3d 956 (9th Cir. 2008) (holding that nothing
9 prohibited a creditor from collecting interest at default rate specified in contract); Platinum Capital
10 v. Sylmar Plaza, 314 F.3d at 1073 (affirming confirmation of a chapter 11 plan that paid
11 unimpaired lender postpetition interest at contract rate); L& J Anaheim Assocs. v. Kawasaki
12 Leasing Int'l, Inc. (In re L & J Anaheim Assocs.), 995 F.2d 940, 942 (9th Cir. 1993) (finding that
13 Congress defined impairment “in the broadest possible terms” and “any alteration of rights
14 constitutes impairment”). Viewed together, and as explained more extensively in the Creditors’
15 Opening Brief, the implications of these decisions are crystal clear. First, the federal judgment
16 rate does **not** apply universally to awards of postpetition interest. Second, unimpairment should
17 be strictly construed to require interest to be paid to unsecured creditors at rates established by
18 state law whether by contract or statute.
19

20

22 CONCLUSION

23 WHEREFORE, based on the foregoing, the Creditor Groups respectfully request that the
24 Court enter an Order requiring that, to the extent the Debtors are determined to be solvent,
25 postpetition interest on unsecured claims under any plan of reorganization that will be confirmed
26 in these cases must be determined by the holders’ state law rights.
27

1 DATED: November 22, 2019
2
3

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Exhibit A

UNITED STATES BANKRUPTCY COURT
DISTRICT OF OREGON

ELIZABETH L. PERRIS
BANKRUPTCY JUDGE

1001 S.W. FIFTH AVENUE, # 700
PORTLAND, OREGON 97204
(503) 326-1536

DIANE K. BRIDGE, LAW CLERK
BETHANY COLEMAN-FIRE, LAW CLERK

August 31, 2012

VIA ECF

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Re: Williams, Love, O'Leary, & Powers, P.C.,
Case No. 11-37021-elp11
Objection to Confirmation

Dear Counsel:

At the close of the August 10, 2012, hearing on confirmation of debtor's proposed chapter 11 plan, I indicated that I would rule in writing. The objecting creditor, Heather Brann, advised the court that she had two objections remaining after certain amendments to the plan and confirmation order language were worked out before and during the hearing. The purpose of this letter is to give you my ruling on those two remaining issues: (1) debtor's failure to provide for alternative treatment for Brann's claims for Tier 2 and Tier 3 fees in the event she prevails on appeal or in the pending adversary proceeding, and (2) debtor's use of the federal judgment interest rate rather than the contract rate for Brann's contract claims. For the reasons explained below, Brann's objections are overruled and debtor's plan will be confirmed as modified per the discussion at the confirmation hearing.

The court shall confirm a chapter 11 plan if the requirements of § 1129(a) are met. Although Brann raised various objections to confirmation based on a number of different provisions in § 1129(a), by the end of the confirmation hearing

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her objections were reduced to the two mentioned above. I will discuss each in turn.

1. Debtor's failure to provide for alternative treatment of Brann's claims for Tier 2 and Tier 3 fees in the event of her success on appeal or in the pending adversary proceeding

Brann asserts that her claims for payment for work she did on Pain Pump cases are secured by an attorney's lien. Following a hearing, I held that Brann does not have an attorney's lien for those fees. Thus, her claims for fees on Pain Pump cases are unsecured.

Brann has appealed the judgment resulting from the attorney's lien ruling, and has asserted claims in Adversary Proceeding No. 11-3279 that, if successful, will in Brann's view require reclassification of her unsecured claims as secured.

Debtor's plan treats Brann's claims for fees as general unsecured claims. The plan does not provide for any alternative treatment of the claims in the event Brann is successful on appeal or in the adversary proceeding.

Brann argues that debtor's failure to provide for alternative treatment (or to allow for modification of the plan) is fatal to confirmation of the plan. She asserts that debtor's failure to preserve her right to alternative treatment demonstrates that debtor's plan has not been proposed in good faith as required by § 1129(a)(3).

Brann does not point to any provision of the Bankruptcy Code that requires debtor to preserve rights she is pursuing on appeal or through litigation to obtain secured status, and I am not aware of any such requirement. This court has ruled that Brann does not have an attorney's lien on the proceeds of settlements from Pain Pump cases. Debtor's treatment of Brann's claims asserting her right to payment for the Pain Pump cases as unsecured is consistent with that ruling.

The fact that a final judgment adjudicating particular issues is on appeal, or that a creditor has asserted alternative theories for transforming an unsecured claim into a secured claim, does not mean that a debtor must provide for alternative treatment of the claim in the event of the creditor's success.

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There is no provision of the Bankruptcy Code, in particular in § 1129(a), that includes such a requirement.

Further, the fact that the debtor's plan treats claims as unsecured that this court has determined to be unsecured is not demonstrative of lack of good faith.

I overrule Brann's objection to the plan that is based on debtor's failure to provide for alternative treatment of Brann's fee claims in the event of success on appeal or in the adversary proceeding.¹ That treatment does not violate the Code or demonstrate lack of good faith.

2. Interest rate on unsecured claims

Second, Brann argues that the plan violates § 1129(a)(7)(A)(ii), the best interest of creditors test,² by providing that postpetition interest will be paid on her contract claims at the federal judgment interest rate rather than at the rate provided in her contract with debtor, which is the state judgment interest rate of 9 percent.

In chapter 11, a non-accepting holder of an impaired claim is entitled to receive a value not less than what the creditor would receive in a chapter 7 liquidation. § 1129(a)(7)(A)(ii). In a chapter 7 liquidation, the general rule is that unsecured creditors are not entitled to postpetition interest on their

¹ Sterling Savings Bank voted in favor of debtor's proposed plan. Any requirement that debtor must provide Brann with alternative treatment in case she prevails on appeal or in the adversary proceeding would directly impact Sterling Savings Bank. Although this impact does not provide a basis for overruling Brann's objection, it demonstrates the complexity debtor would face if it were required to accommodate Brann's "what if" objection. Providing for such a contingency might cause Sterling Savings Bank to change its vote in favor of the plan, thereby raising a new set of legal and factual issues for debtor.

² Brann may also be arguing that use of the federal judgment interest rate shows a lack of good faith. Because debtor is correct about the interest rate, its use in the plan cannot demonstrate lack of good faith.

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claims. See § 502(b)(2) (disallow claim to extent it is for unmatured interest). An exception to that rule applies when the debtor is solvent. § 726(a)(5). In that case, an unsecured creditor is entitled to postpetition interest "at the legal rate[.]" Id. "At the legal rate" means the federal judgment interest rate, not the contract or state judgment interest rate. In re Cardelucci, 285 F.3d 1231 (9th Cir. 2002).

Brann argues that Cardelucci does not apply to her contract claims because that case involved a prepetition tort judgment, not a contract claim. Because Brann's contract calls for interest at the state judgment interest rate, which is 9 percent, she argues that she is entitled to postpetition interest at 9 percent.

Cardelucci did involve a prepetition tort judgment. The judgment debtor filed chapter 11, and sought to pay postpetition interest at the federal judgment interest rate rather than the state judgment interest rate. However, the court considered the more general question of what interest rate applies to the claim of an unsecured creditor when the debtor is solvent:

Where a debtor in bankruptcy is solvent, an unsecured creditor is entitled to "payment of interest at the legal rate from the date of the filing of the petition" prior to any distribution of remaining assets to the debtor. 11 U.S.C. § 726(a)(5). The question presented by this appeal is whether "interest at the legal rate" means a rate fixed by federal statute or a rate determined either by the parties' contract or state law.

285 F.3d at 1234.

After considering the statutory language, the court concluded that "the legal rate" as used in § 726(a)(5) means the federal judgment interest rate. The court also noted that using this rate "promotes uniformity within federal law," explaining that "[a]s of the date of the filing of the petition, creditors hold a claim, similar to a federal judgment, against the estate, the payment of which is only dependent upon completion of the bankruptcy process." Id. at 1235. "In bankruptcy, an allowed claim becomes a federal judgment and therefore entitles the holder of the judgment to an award of interest pursuant to federal statute." Id. Section 726(a)(5) applies to unsecured

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claims in general, whether those claims arise out of contract or tort.

Brann further argues that Cardelucci is inconsistent with United Savings Assoc. of Texas v. Timbers of Inwood Forest Assocs., Ltd., 484 U.S. 365 (1988), which said that, when a debtor is solvent, "§ 726(a)(5) provides that postpetition interest is allowed on unsecured claims." 484 U.S. at 379. The fact that the statute requires payment of postpetition interest does not tell us what the rate of interest to be paid should be. That question is answered by the language of § 726(a)(5), requiring payment at "the legal rate." Nothing in Timbers of Inwood interprets "the legal rate." It simply did not address the issue addressed in Cardelucci and that is the subject of Brann's objection here.

Brann also argues that Cardelucci has been overruled by Travelers Cas. & Sur. Co. of Am. v. Pac. Gas & Elec. Co., 549 U.S. 443 (2007), and Gen'l Elec. Capital Corp. v. Future Media Productions, Inc., 536 F.3d 969 (9th Cir. 2008). I disagree. The issues in those cases differ from the one here, which is the meaning of "the legal rate" of interest as used in § 726(a)(5). The point of both of those cases, as relevant here, is that creditors' rights are determined under state law, unless some provision of the Bankruptcy Code provides otherwise. With regard to the postpetition interest rate on the claims of unsecured creditors, the Bankruptcy Code provides otherwise. Unsecured creditors are generally denied unmatured interest on their claims, § 502(b)(2), unless the debtor is solvent, in which case unsecured creditors are entitled to interest "at the legal rate." § 726(a)(5). Nothing in the cases Brann cites supports a definition of "the legal rate" as other than the federal judgment interest rate.

Therefore, I will overrule Brann's interest rate objection to debtor's plan.

3. Other confirmation requirements

Brann's other objections to debtor's proposed plan were resolved before or at the confirmation hearing. However, even in the absence of an objection to confirmation, the court is required to satisfy itself that the requirements of confirmation have been met. In re Ambanc La Mesa Ltd. P'ship, 115 F.3d 650,

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653 (9th Cir. 1997); In re Perez, 30 F.3d 1209, 1213 (9th Cir. 1994).

The court has considered the requirements for confirmation set out in § 1129(a) and finds that all requirements have either been met or do not apply.

Brann spent a good deal of her briefing and confirmation hearing challenging debtor's good faith in proposing the plan, seeking to support her objection under § 1129(a)(3). I am not convinced by either Brann's argument or the testimony elicited in the hearing that debtor's plan was not proposed in good faith. Therefore, to the extent Brann's good faith objection is based on something other than the issues discussed in paragraphs 1 and 2 above, the objection is overruled.

4. Conclusion

Brann's objections to confirmation are overruled. Debtor's Third Amended Plan, as modified by language discussed at the confirmation hearing, will be confirmed. Mr. Kennedy should submit the confirmation order after presenting it to Brann and her counsel for approval as to form.

Very truly yours,



ELIZABETH L. PERRIS
Bankruptcy Judge